A **DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP**

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
ZAHARAH IBRAHIM CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
B RAMLY ALI FCJ
TENGKU MAIMUN TUAN MAT FCJ
IDRUS HARUN FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: (L)-75-03-2019]
C 10 APRIL 2019

CRIMINAL LAW: *Charges – Criminal charges – Accused, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money*
D *Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Charges initially filed at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – High Court allowed application by prosecution to withdraw transfer certificates – Decision of High Court affirmed by Court of Appeal – Appeal against decision of Court of Appeal – Whether*
E *appeal ought to be allowed*

CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – Transfer of charges – High Court allowed application by prosecution to withdraw transfer certificates – Decision of High Court affirmed by Court of Appeal – Appeal against decision of Court of Appeal – Accused, former Prime Minister of Malaysia,*
F *charged with seven criminal charges – Charges initially filed at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – Whether there was breach of natural justice – Whether Public Prosecutor's power to withdraw transfer certificate spent when certificate was acted on – Whether Public Prosecutor functus officio – Whether High Court's reasoning flawed –*
G *Whether High Court Judge could transfer case back to himself – Whether appeal ought to be allowed – Criminal Procedure Code, ss. 417(1), (2) & 418A – Malaysian Anti-Corruption Commission Act 2009, s. 60*

The appellant, former Prime Minister of Malaysia, was charged with seven charges relating to offences committed under the Penal Code, the Malaysian
H Anti-Corruption Commission Act 2009 ('MACCA') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the seven charges'). The seven charges were registered under three different suits on two different dates. The first four charges were filed on 4 July 2018 while the remaining three charges were filed on 8 August 2018.
I On both dates, the charges were initially filed at the Sessions Court before they were transferred to the High Court, pursuant to the certificates issued by the Public Prosecutor ('PP') under s. 418A of the Criminal Procedure Code ('CPC') and s. 60 of the MACCA. At the High Court, the PP withdrew

the above-mentioned transfer certificates. Allowing the application, the High Court Judge ('HCJ') held (i) the transfer certificates, under s. 418A of the CPC and s. 60 of the MACCA, could only be validly issued by the PP in cases where the accused had not pleaded guilty and, where no evidence against the accused had been adduced, there is no such limitation for transfer under s. 417 of the CPC, as made plain in sub-s. (4); and (ii) the HCJ had the power to transfer, under s. 417(2) of the CPC, and this power was equated to that of revisionary powers of the High Court under the CPC and, especially the Courts of Judicature Act 1964, where the High Court may act on its own motion and call for the record of proceedings in the subordinate courts. The seven charges were transferred back to the same High Court and to continue from the point of the withdrawal (7 February 2019) with the proceedings prior to the withdrawal remaining valid. The appellant appealed to the Court of Appeal. Affirming the decision of the HCJ, the Court of Appeal held that (i) there were adequate reasons for the HCJ's refusal of the adjournment as the reasons laid in the very considerations under s. 417(1)(e) of the CPC. When the HCJ made the order on its own initiative, under s. 417(2) of the CPC, it was an exercise of discretion to transfer the three cases from the Sessions Court to the High Court, pursuant to s. 417(1)(cc) of the CPC, which entailed a consideration whether such an order was expedient for the ends of justice under s. 417(1)(e); (ii) the HCJ merely gave a brief decision orally on 7 February 2019 after hearing the parties. His Lordship did not give any signed written judgment on 7 February 2019; what the HCJ signed as 'Salinan Diakui Sah' was the notes of proceedings of 7 February 2019 and the signature below the said decision was part of the practice of a judicial officer signing or placing his initials on the notes of proceedings to show an event has occurred in the proceedings. This could be seen throughout the notes of proceedings. The second impugned judgment dated 15 February 2019 ought not to be expunged or disregarded and not form part of the record; (iii) the concept of *functus officio* applies to a court of law and not the acts of the PP under the Federal Constitution. The doctrine of *functus officio* is part of the doctrine of *res judicata*. A party could not ask the court to re-visit the same dispute. The appellant's submission that the PP could not be said to have the power to withdraw a s. 418A certificate as the power was spent when the said certificate was acted on and the PP was *functus officio* bore no merit; (iv) the application by the HCJ of the doctrine of prospective overruling is justified; and (v) the AG was merely highlighting to the HCJ the options and left it entirely for His Lordship to decide under s. 417(2) of the CPC. 'On its own initiative', among others, means 'to initiate is therefore to cause a process or action to begin'. This was what the HCJ did: acting on the initiative of the High Court in the exercise of his discretion under s. 417(2) of the CPC, His Lordship decided that the seven charges should continue to be tried by the High Court on the basis that it would be expedient for the ends of justice under s. 417(1)(e) after taking into account

several considerations. Hence, the present appeal. The issues that arose for determination were (i) whether there was a breach of natural justice by the HCJ as he refused adjournment and had given two judgments; (ii) whether the PP's withdrawal of the transfer certificate was wrong in law; and (iii) whether the manner in which the HCJ exercised his discretion, under s. 417(2) of the CPC, was flawed both in law and fact, as the HCJ did not act on his own initiative but rather at the behest of the PP.

Held (dismissing appeal)
Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The discretion, to either allow or refuse adjournment, was solely within the HCJ's discretion. That discretion must be exercised judicially and that would require the HCJ to take into consideration the litigant's right to be heard and to be treated fairly. The HCJ took the correct approach in taking a route consistent to a quick disposal of the matter. The fact that the appellant had a team of experienced counsel, led by a well-known criminal counsel, would have given comfort to the HCJ to take the route that he took. The issue was not as complicated as the counsel made it out to be. It was only a matter of determining the legality of the action of withdrawal by the PP of the transfer certificates and the manner in which the HCJ exercised his discretion under s. 417(2) of the CPC. There was no breach of natural justice on the part of the HCJ. (paras 28-31)

(2) The appellant complained (i) that the HCJ had given two judgments; one on 7 February 2019 and the other on 15 February 2019; (ii) as some reasons and case laws in the second judgment were not mentioned in the first judgment, the appellant was deprived of the opportunity to submit on those missing reasons and case laws; and (iii) in his first judgment, the HCJ did not intimate that it was only 'brief grounds' or that 'full grounds would follow'. There was no merit in this complaint. The deliberation of the issue, of the legality of the certificates and the consequence of that withdrawal, did not require the HCJ to seek out facts to justify his decision and this was not done by him. This was clearly reflected in the second judgment. What the HCJ did was practiced prevalently among judges in Malaysia when they are dealing with interlocutory matters, especially in the criminal courts which require a quick decision. (paras 32-34)

(3) The HCJ was not wrong in saying that with the power to institute, comes the power to withdraw the certificate. Section 418A(1) of the CPC and s. 60 of the MACCA are explicit in that Parliament has conferred on the PP the power to issue a certificate requiring a subordinate court to transfer to the High Court any particular criminal case which is triable by the subordinate court and which is pending before that court.

Although the two sections do not specify the power of withdrawal by the PP, such power could be read into the sections by virtue of art. 145(3) and (3A) of the Federal Constitution. The certificate of transfer fell within the ambit of the power of the PP to institute the proceedings for an offence before a court of criminal jurisdiction. There was no prohibition on the PP to withdraw as the concept of *functus officio* had no application at all. (paras 39-41 & 45)

(4) There was no merit in the appellant's complaint that the HCJ did not act on his own initiative but rather at the behest of the PP. The circumstances in which the HCJ was confronting must be taken into account. The HCJ was faced with a situation where the PP wanted to withdraw the transfer certificate and the PP had set out the two options available to the HCJ who then invited submissions when the withdrawal of the transfer certificate met with opposition from the appellant. Under such circumstances, it could not be said that the HCJ was nudged by the PP to exercise his discretion. (paras 46 & 47)

(5) As to whether the HCJ was correct to exercise the discretion, the answer could only be found in the manner the HCJ exercised that discretion. The basis of the transfer justified the exercise of such power vested in a High Court Judge. Although s. 417(1) of the CPC uses 'High Court', instead of 'a judge', judge should be read into 'High Court' as the section provides for powers vested in the High Court, a court which is presided by a judge appointed with specific powers and jurisdictions. The HCJ then made an order for the seven charges to be transferred and tried before the High Court. This was in line with s. 417(1)(cc) of the CPC. There was no error on the part of the HCJ in exercising his discretion in the manner that he did. He did not take into account irrelevant considerations. The discretion had been exercised judicially. It was in the public interest, as well as the interest of the accused, that criminal cases are to be disposed of expeditiously by the courts. (paras 48, 52, 54 & 56)

(6) The transfer was valid and not flawed, either in law or in fact. The withdrawal of the transfer certificate was effective only prospectively and had no effect on the proceedings on the seven charges since 4 July 2018, before the withdrawal, which remained valid. Even if there was any irregularity in the exercise of the power, which there was none, this was well within the ambit of the general curing provision under s. 422 of the CPC. (paras 57, 58 & 60)

***Bahasa Malaysia** Headnotes*

Perayu, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan berkaitan pelakuan kesalahan-kesalahan bawah Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('ASPRM') dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil

Daripada Aktiviti Haram 2001 ('tujuh pertuduhan'). Tujuh pertuduhan ini didaftarkan bawah tiga guaman berbeza pada tarikh berbeza. Empat pertuduhan pertama difailkan pada 4 Julai 2018 manakala tiga lagi difailkan pada 8 Ogos 2018. Pada kedua-dua tarikh, pertuduhan-pertuduhan tersebut asalnya difailkan di Mahkamah Sesyen sebelum kesemuanya dipindahkan ke Mahkamah Tinggi, menurut akuan-akuan yang dikeluarkan oleh Pendakwa Raya ('PR') bawah s. 418A Kanun Tatacara Jenayah ('KTJ') dan s. 60 ASPRM. Di Mahkamah Tinggi, PR memfailkan permohonan menarik semula akuan-akuan pindah yang dinyatakan di atas. Membenarkan permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) akuan-akuan pindah, bawah s. 418A KTJ dan s. 60 ASPRM, hanya boleh dikeluarkan secara sah oleh PR dalam kes-kes apabila tertuduh tidak mengaku salah dan, apabila tiada keterangan dikemukakan terhadap tertuduh, tiada had terhadap pindah milik bawah s. 417 KTJ, seperti yang jelas ternyata bawah sub-s. (4); dan (ii) HMT mempunyai kuasa memindah, bawah s. 417(2) KTJ, dan kuasa ini sama dengan kuasa-kuasa semakan Mahkamah Tinggi bawah KTJ dan, khususnya Akta Mahkamah Kehakiman 1964, iaitu Mahkamah Tinggi boleh bertindak atas usulnya dan meminta rekod prosiding mahkamah bawahan. Tujuh pertuduhan tersebut dipindah semula ke Mahkamah Tinggi yang sama agar bermula dari titik penarikan semula (7 Februari 2019) dan prosiding sebelum penarikan kekal sah. Perayu merayu ke Mahkamah Rayuan. Mengesahkan keputusan HMT, Mahkamah Rayuan memutuskan (i) terdapat alasan yang kuat untuk penolakan HMT akan penangguhan berdasarkan pertimbangan bawah s. 417(1)(e) KTJ. Apabila HMT mengeluarkan perintah tersebut atas inisiatif beliau, bawah s. 417(2) KTJ, ini adalah penjalanan budi bicara untuk memindah ketiga-tiga kes dari Mahkamah Sesyen ke Mahkamah Tinggi, bawah s. 417(1)(cc) KTJ, yang melibatkan pertimbangan sama ada perintah sedemikian wajar demi keadilan bawah s. 417(1)(e); (ii) HMT sekadar memberi keputusan ringkas, secara lisan, pada 7 Februari 2019 selepas mendengar pihak-pihak. Beliau tidak menyampaikan penghakiman bertulis yang bertandatangan pada 7 Februari 2019; yang HMT tandatangani sebagai 'Salinan Diakui Sah' adalah nota prosiding 7 Februari 2019 dan tandatangan di bawah keputusan adalah sebahagian amalan pegawai kehakiman menurunkan tandatangan atau tanda nama pada nota prosiding untuk menunjukkan satu peristiwa telah berlaku dalam prosiding. Ini boleh dilihat di dalam keseluruhan nota prosiding. Penghakiman kedua yang dipertikaikan, bertarikh 15 Februari 2019, tidak sepatutnya dipotong atau diabaikan dan tidak membentuk sebahagian rekod; (iii) konsep *functus officio* terpakai pada mahkamah undang-undang dan bukan tindakan-tindakan PR bawah Perlembagaan Persekutuan. Doktrin *functus officio* adalah sebahagian doktrin *res judicata*. Satu-satu pihak tidak boleh memohon mahkamah melihat semula pertikaian yang sama. Hujahan perayu, bahawa PR tidak boleh dikatakan mempunyai kuasa menarik semula akuan s. 418A kerana kuasa ini dijalankan semasa akuan dikuatkuasakan dan PR *functus officio*, tidak bermerit; (iv) pemakaian

doktrin penolakan prospektif oleh HMT adalah wajar; dan (v) AG sekadar menekankan pada HMT pilihan-pilihan yang ada dan menyerahkan segalanya kepada beliau untuk membuat keputusan bawah s. 417(2) KTJ. 'Atas inisiatifnya', antara lain, bermaksud 'memulakan iaitu membuatkan satu proses atau tindakan bermula'. Ini yang dilakukan oleh HMT: bertindak atas inisiatif Mahkamah Tinggi dalam penjalanan budi bicara beliau bawah s. 417(2) KTJ, beliau memutuskan tujuh pertuduhan tersebut akan disambung bicara oleh Mahkamah Tinggi atas alasan ini wajar demi keadilan bawah s. 417(1)(e) selepas mengambil kira beberapa pertimbangan. Maka timbul rayuan ini. Isu-isu yang timbul untuk diputuskan adalah (i) sama ada terdapat pencabulan keadilan asasi oleh HMT kerana beliau menolak penangguhan dan memberi dua penghakiman; (ii) sama ada penarikan semula PR akan akuan pindah satu kesalahan bawah undang-undang; dan (iii) sama ada cara HMT menjalankan budi bicara beliau, bawah s. 417(2) KTJ, cacat bawah undang-undang dan fakta kerana HMT tidak bertindak atas inisiatif beliau tetapi atas perintah PR.

Diputuskan (menolak rayuan)
Oleh David Wong Dak Wah HB (Sabah & Sarawak):

(1) Budi bicara, sama ada membenarkan atau menolak penangguhan, sepenuhnya milik HMT. Budi bicara ini mesti dijalankan secara kehakiman dan ini memerlukan HMT mengambil kira hak pelitigasi dibicarakan dan diberi layanan adil. Hakim Mahkamah Tinggi mengambil pendekatan yang betul iaitu jalan yang selaras dengan pelupusan serta merta hal perkara tersebut. Fakta bahawa perayu mempunyai sepasukan peguam yang berpengalaman, diketuai oleh peguam jenayah yang terkenal, sepatutnya menyenangkan hati HMT untuk mengambil langkah yang beliau ambil. Isu yang timbul bukanlah serumit yang dinyatakan oleh peguam. Ini hanya berkenaan menentukan kesahan tindakan penarikan semula oleh PR akan akuan-akuan pindah dan cara beliau menggunakan budi bicara beliau bawah s. 417(2) KTJ. Tiada pencabulan keadilan asasi oleh HMT.

(2) Perayu mengadu (i) bahawa HMT telah memberi dua penghakiman; satu pada 7 Februari 2019 dan satu lagi pada 15 Februari 2019; (ii) oleh kerana beberapa alasan dan kes undang-undang dalam penghakiman kedua tidak disebut dalam penghakiman pertama, perayu dinafikan peluang berhujah tentang alasan-alasan dan kes-kes undang-undang tersebut; dan (iii) dalam penghakiman pertama beliau, HMT tidak ada menyebut penghakiman tersebut satu 'penghakiman ringkas' atau bahawa 'alasan penuh akan mengikuti'. Tiada merit dalam aduan ini. Pertimbangan isu, tentang kesahan akuan dan akibat penarikan, tidak mengkehendaki HMT mencari fakta untuk menjelaskan keputusan beliau dan ini tidak beliau lakukan. Ini jelas tercermin dalam

penghakiman kedua. Hakim Mahkamah Tinggi mengamalkan sesuatu yang lazim diamalkan oleh hakim-hakim di Malaysia apabila berdepan dengan hal-hal perkara interlokutori, khususnya di mahkamah jenayah yang memerlukan keputusan dengan cepat.

(3) Hakim Mahkamah Tinggi tidak terkhilaf apabila mengatakan, dengan kuasa memulakan, terdapat juga kuasa menarik balik akuan. Seksyen 418A(1) KTJ dan s. 60 ASPRM jelas menyatakan Parlimen memberi kuasa kepada PR untuk mengeluarkan akuan mengkehendaki mahkamah bawahan memindah kepada Mahkamah Tinggi apa-apa kes jenayah yang boleh dibicarakan oleh mahkamah bawahan dan masih belum selesai. Walaupun dua seksyen ini tidak menyatakan kuasa menarik semula oleh PR, kuasa sedemikian boleh disiratkan dalam seksyen-seksyen ini melalui per. 145(3) dan (3A) Perlembagaan Persekutuan. Akuan terangkum dalam ruang lingkup kuasa PR untuk memulakan prosiding untuk satu kesalahan di mahkamah berbidang kuasa jenayah. Tiada larangan terhadap PR untuk menarik semula kerana konsep *functus officio* langsung tiada keterpakaian.

(4) Tiada merit dalam aduan perayu bahawa HMT tidak bertindak atas inisiatif beliau sendiri tapi atas perintah PR. Hal-hal keadaan yang ditangani oleh HMT harus diambil kira. Hakim Mahkamah Tinggi berdepan dengan situasi yang PR ingin menarik balik akuan pindah dan PR telah memberi dua pilihan kepada HMT yang seterusnya mempelawa hujahan apabila penarikan semula akuan pindah ditentang oleh perayu. Berdasarkan hal-hal keadaan ini, tidak boleh dikatakan bahawa HMT diarah oleh PR untuk menjalankan budi bicara beliau.

(5) Sama ada, atau tidak, HMT betul dalam penjalanan budi bicara beliau, jawapannya hanya boleh diperoleh berdasarkan cara HMT menjalankan budi bicara tersebut. Asas pindahan mewajarkan penjalanan kuasa yang ada pada seorang Hakim Mahkamah Tinggi. Walaupun s. 417(1) KTJ menggunakan 'Mahkamah Tinggi', dan bukan 'seorang hakim', hakim harus disiratkan dalam 'Mahkamah Tinggi' sebagai seksyen yang memperuntukkan kuasa-kuasa pada Mahkamah Tinggi, mahkamah yang disidangi oleh seorang hakim yang dilantik dengan kuasa-kuasa khusus dan bidang kuasa. Hakim Mahkamah Tinggi kemudian mengeluarkan perintah agar tujuh pertuduhan tersebut dipindah dan dibicarakan di Mahkamah Tinggi. Ini selaras dengan s. 417(1)(cc) KTJ. Tiada kekhilafan oleh HMT dalam menjalankan budi bicara beliau dalam cara yang beliau lakukan. Beliau tidak mempertimbangkan pertimbangan-pertimbangan yang tidak relevan. Budi bicara dijalankan secara kehakiman. Demi kepentingan awam, dan kepentingan tertuduh, kes-kes jenayah dilupus secara wajar oleh mahkamah.

(6) Perpindahan tersebut sah dan tidak cacat, baik dari segi undang-undang mahupun fakta. Penarikan semula akuan pindah berkuat kuasa hanya secara prospektif dan tiada kes pada prosiding tujuh pertuduhan sejak 4 Julai 2018, sebelum penarikan semula, yang kekal sah. Jika pun terdapat apa-apa ketidakaturan dalam menjalankan kuasa ini, yang tidak berlaku dalam kes ini, ini dalam rangkuman peruntukan am remedi bawah s. 422 KTJ.

Case(s) referred to:

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLI 145 FC ***(refd)***

Leung and Another v. Minister for Immigration and Multicultural Affairs [1997] 150 ALR 76 ***(refd)***

PP v. Lim Shui Wang [1979] 1 MLJ 65 ***(refd)***

Re Application of Tan Boon Liat; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964. s. 78(1)

Criminal Procedure Code, ss. 51A, 417(1)(a), (b), (c), (d), (e), (aa), (bb), (cc), (2), 418A(1), 422

Federal Constitution, art. 145(3), (3A)

Interpretation Acts 1948 and 1967, s. 40(1)

Malaysia Anti-Corruption Commission Act 2009, s. 60

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[Editor's note: For the Court of Appeal judgment, please see Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 293 (affirmed); For the High Court judgment, please see [2019] 5 CLJ 355 (affirmed).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

Introduction

[1] The appellant was charged with seven criminal charges by the Public Prosecutor under the Penal Code, the MACC Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFAPUAA) which were registered under three different case nos - WA-45-2-07-2018, WA-45-3-07-2018 and WA-45-08-2018.

[2] Four of the charges are pursuant to the Penal Code and MACC Act 2009 with the balance pursuant to AMLATFAPUAA. The first four charges were filed on 4 July 2018 with the balance three charges on 8 August 2019. All the seven charges were transferred to the High Court on 8 August 2019, where the appellant pleaded not guilty. Trial dates were then fixed by the High Court to commence on 12 February till 29 March 2019.

[3] The charges were initially filed in the Sessions Court as required by law. However, the cases of the seven charges were transferred to the High Court pursuant to certificates issued by the Public Prosecutor under s. 418A of the CPC and s. 60 of the MACC Act (transfer certificate).

[4] On 7 February 2019 the Public Prosecutor withdrew the transfer certificate for the seven charges premised on the ground of "abundance of caution" to avoid the possibility that the transfer certificate may be declared unconstitutional and held to be a nullity in view of two recent Federal Court decisions in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145.

[5] The withdrawal of the transfer certificate by the Public Prosecutor then became a matter of dispute as to what would be the legal ramifications. Learned counsel for the appellant challenged the legitimacy of the withdrawal by the Public Prosecutor.

[6] The learned judge then heard submissions and after due deliberation found that there was nothing improper in the action taken by Public Prosecutor in regard to the transfer certificate.

[7] Appeal was lodged by the appellant to the Court of Appeal where the learned judges confirmed that the decision of the learned judge on 21 March 2019 triggering this appeal before this court which we heard on 4 and 5 April 2019.

Background Facts

[8] The salient facts relating to this withdrawal of the transfer certificate in our view must be made known and they are these. The Public Prosecutor at the withdrawal hearing on 7 February 2019 after informing the court of his intention of withdrawal then pointed out to the learned judge that there are two options available to him.

[9] The first option was that upon withdrawal, the cases on the seven charges would be remitted back to the Sessions Court where they were first filed. The prosecution then will make an application under s. 417 to the court to transfer the aforesaid cases to the High Court. The route *via* the s. 418A would be waived.

[10] The second option was under s. 417(2) of the CPC where the learned judge can on its own motion transfer the cases from the Sessions Court back to the High Court.

[11] In short, the learned judge had a choice and it was impressed upon by the Public Prosecutor that a decision is necessary urgently so that there would not be any more postponement of the starting date of trial on 12 February 2019 as the prosecution had complied with s. 51A of the CPC in delivering documents required of them.

[12] The learned judge then invited respective counsel to address him on which option he should undertake.

High Court

[13] On the power of the Public Prosecutor to withdraw the transfer certificate, this is what the learned judge said:

> [35] For it is important to note that under Section 418B of the CPC and Section 60(5) of the MACC Act, the certificate for transfer under both Section 418A and Section 60 can only validly be issued by the Public Prosecutor in cases where the accused has not pleaded guilty and where no evidence against the accused has been adduced (incidentally) there is no such limitation for transfer under Section 417, as made plain in subsection (4).
>
> [36] In other words, in respect of the latter, the trial has not commenced with any witness testimony. This is exactly the situation in the instant proceeding before me. The trial for the three suits containing the 7 charges have not commenced when the Section 418A and the Section 60 transfer certificates were issued. Neither, crucially for present purposes, has the trial started when the Public Prosecutor now applies to have the same certificates withdrawn.

[14] On his power to transfer cases from the Sessions Court, the learned judge found as a matter of fact that he had the power to transfer under s. 417(2) of the CPC and he equated this power to that of revisionary powers of the High Court under the CPC and especially the Courts of Judicature Act 1964, where the High Court may act on its own motion and call for the record of proceedings in the subordinate courts.

[15] As for the crucial issue of whether he ought to exercise his discretion, the learned judge had this to say:

> [60] Further, in the instant case, if the 7 charges which reverted to the Sessions Court upon withdrawal of the certificates be perused by the prosecution by way of an application by the prosecution for a transfer to the High Court, the 7 charges might end up in a different High Court. That in my view does not accord with the ends of justice under Section 417(1)(c) for the reasons I have earlier set out, as to why this High Court should continue trying the 7 charges.

A [61] if I do not exercise my discretion, the 7 charges could be registered in any one of the other three High Court, and where new trial dates would have to be fixed by the High Court Judge depending on available dates of that High Court, despite the original trial dates in February and March 2019 having fixed several months back in early August 2018. Such state of affairs is plainly unsatisfactory and patently inconsistent with the
B ends of justice considering the circumstances of the case.

[62] How can it be when the prosecution have already delivered the Section 51A and certain witness statements to the accused, as well as issued summons for witnesses to attend trial as scheduled? More so, crucially, when no prejudice or injustice could be shown to have been
C occasioned to the accused by this transfer order initialled by the High Court.

[16] The learned judge in justifying his exercise of discretion relied on the apex court case of *PP v. Lim Shui Wang* [1979] 1 MLJ 65 where Suffian LP said this:

D From subsection (2) of section 417 it is clear that the High Court may transfer a case on the report of the lower Court or on an application of the Attorney General or as happened here, on its initiative; but this subject to two restrictions. First, the High Court may do so only for the reasons stated in paragraphs (a) to (e) of subsection 417, and secondly,
E the High Court may transfer a case only from a subordinate Court to another subordinate Court or to itself, but not from itself to subordinate Court.

The Court Of Appeal

[17] The Court of Appeal dealt with the appeal premised on its right to
F treat the appeal as a continued hearing of the matter and the appeal before it would be treated as a rehearing such that all the relevant evidence can be looked at and reviewed as if it was hearing it for a first time.

[18] In regard of the breach of natural justice contention which is concerned with the refusal of the learned judge to grant an adjournment
G requested by the appellant and the existence of a second judgment by the learned judge.

[19] In regard to the refusal of adjournment, the Court of Appeal examined the notes of proceedings of that hearing and found that learned counsel for the appellant had ample time to submit before the learned judge, so much so,
H learned counsel concluded his submission by saying to the court that "I don't think I need to add anymore unless the court has some questions".

[20] This was how the Court of Appeal concluded:

I Paragraph 33

[33] On the facts of this appeal before us, we conclude that there are adequate reasons for the learned HCJ's refusal of the adjournment as the reasons for the refusal for the adjournment lie in the very considerations under s. 417(1)(e) (reproduced in para 14(vii) above) because when the

learned HCJ made the order on its own initiative under s. 417(2) of the CPC, it is an exercise of discretion to transfer the 3 cases from the Sessions Court to the High Court pursuant to s. 417(1)(cc) which entails a consideration whether such an order is expedient for the ends of justice under s. 417(1)(e). Further, for the reasons explained, there is compliance with the 4th and 5th principles mentioned in *Lee Ah Tee (supra)* as all necessary matters has been considered; neither is the decision not to adjourn exercised arbitrarily nor has the refusal to adjourn resulted in injustice to the Appellant. Hence we refrain from appellate interference.

[21] As for the contention that the learned judge's second judgment ought to be set aside, the Court of Appeal refused to do so for reasons as set out in paras. [41] and [42]:

Paragraphs 41 and 42

[41] In the present appeal, we find the learned HCJ merely orally gave a brief decision on 7/2/2019 after hearing the parties. He not give any signed Written Judgment on 7/2/2019 in the manner referred to in the cases at para 36 above; what the learned HCJ signed as "Salinan Diakui Sah" was the Notes of Proceedings of 7/2/2019 and the signature below the said decision is part of the practice of a judicial officer signing or initialing his Notes of Proceedings to show an event has occurred in the proceedings. This can be seen throughout the Notes of Proceedings (pp. 5, 13, 19 and 24). Thus the 2nd Impugned Judgment dated 15/2/2019 ought not to be expunged or disregarded and not form part of the record as urged upon us by the Appellant.

[42] In the event we err in our decision in that the 2nd Impugned Judgment ought to be disregarded, following *Mrs Thitapha Charoenchuea* and *Habee Bur Rahman*, it is a mere irregularity which does not justify the proceedings being regarded a nullity and the only effect is we must consider the Decision delivered on 7/2/2019 and disregard the Impugned 2nd Judgment. In any event, by way of rehearing this Court is entitled to review and re-evaluate all the evidence available and the Submissions of the parties before us to arrive at our decision in this appeal. Hence there is no merit in the Appellant's suggestion for this Court to set aside the 2nd Impugned Judgment and to remit the case to another High Court for full arguments.

[22] In regard to the public prosecutor's power to withdraw the transfer certificate, the Court of Appeal had no difficulty in sustaining the contention that the Public Prosecutor under the law had the power to withdraw premised on the fact that art. 145(3) and 145(3A) respectively empowers the public prosecutor, at his discretion, to institute, conduct or discontinue any proceeding and transfer proceedings. And with such power, there is an implicit power to withdraw.

[23] The Court of Appeal also relied on case law to support the implicit power of the Public Prosecutor to withdraw the transfer certificate. This is clear in paras. [51] and [52] of the grounds which read as follows:

> [51] Further we are of the considered view that the cases of *Kieron Stannard v. Crown Prosecution Service* [2019] EWHC 84 (Admin)(QBD) (online print out) a Community Protection Notice ('CPN') issued under s.43 of the Anti-social Behaviour, Crime and Policing Act 2014)), *Regina v. Bristol City Council, Ex parte Everett* [1999] 1 WLR 1170 (English CA) (an abatement notice issued under the Environmental Protection Act 1990) and *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495 (CA) (revocation by State Authority of approval for alienation of land) all cited by the Respondent are of assistance. Whilst the fact pattern of these 3 cases differ from the present case, we are of the view that the principle that the Courts therein have held there was an implicit power to withdraw although there is no express statutory power to issue the 2 documents (2 English cases) and no express power of revocation (the local case) can by analogy be applicable.
>
> [52] We agree with the Respondent's submission that the concept of *functus officio* applies to a Court of law and not acts of the PP under the Federal Constitution. As held by the Court of Appeal in *Badiaddin bin Mohd Mahadin & Anor v. Arab Malaysian Finance Bhd* [1988] 1 MLJ 393 at p. 429 G, the doctrine of *functus officio* is part of the doctrine of *res judicata*; hence a party cannot ask the Court to re-visit the same dispute. Therefore the Appellant's submission that the PP cannot be said to have the power to withdraw a s. 418A certificate as the power is spent when the said certificate is acted on and the PP is thereafter *functus officio* bears no merit.

[24] The Court of Appeal expressed its agreement with the learned judge's application of the doctrine of prospective overruling.

> We find the application by the learned HCJ of the doctrine of prospective overruling is justified as this doctrine is recognised and applied by the Supreme Court in the case of *Public Prosecutor v. Dato' Yap Peng*. At p.321 B-D of the judgment, after the Court (by majority) declared s.418A to be unconstitutional and void as being an infringement of the provisions of Article 121(1), it applied "the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

[25] As for the contention that the learned judge did not act on his own initiative, the Court of Appeal had this to say:

> [56] It is our considered view what the learned AG did was merely highlighting to the learned HCJ the options and left it entirely for him to decide under s. 417(2) CPC. It is observed the "on its own initiative" among others also means "To initiate is therefore to cause a process or action to begin" (see *State v. Transferees*). This is precisely what the learned HCJ did: acting on the own initiative of the High Court (presided by him

as the Judge) in the exercise of his discretion under s.417(2), he decided that the 7 charges should continue to be tried by the High Court on the basis that it would be expedient for the ends of justice under s.417(1)(e) after taking into account several considerations (paras 45 to 50 of the Impugned 2nd Judgment)

Our Decision

[26] Before us, learned counsel for the appellant listed out eight complaints and these can be dealt with under the following heads of complaints:

(i) Breach of natural justice by the learned judge.

(ii) Public prosecutor's withdrawal of the transfer certificate was wrong in law.

(iii) The manner in which the learned judge exercised his discretion under s. 417(2) of the CPC was flawed both in law and fact.

Breach Of Natural Justice

Refusal To Grant An Adjournment

[27] This complaint emanates from the learned judge's refusal to grant an adjournment on 7 February 2019 when the Public Prosecutor without notice sought to withdraw the transfer certificate. Learned counsel submits that he was taken by surprise and in his view the withdrawal of the transfer certificate raised complex constitutional issues which merited more than the half hour adjournment given by the learned judge. Further, learned counsel submits that they were in unchartered territory and time must be given for detailed research on the action of the Public Prosecutor.

[28] The discretion to either allow or refuse adjournment is solely within the discretion of the learned judge. That is trite. That discretion of course must be exercised judicially and that would require the learned judge to take into consideration of the litigant's right to be heard and to be treated fairly. That said, an expeditious disposal of interlocutory matters especially in criminal matters must also feature in the consideration of the learned judge. With that, we examine whether there has been a breach of natural justice in the circumstances of this case.

[29] Firstly, we take note of the fact that the issue raised is interlocutory in nature in a criminal case. That being the case, the learned judge took the correct approach in taking a route consistent to a quick disposal of the matter. The fact that the appellant had a team of experienced counsel led by a well-known criminal counsel would have given comfort to the learned judge or for that matter for any court to take the route that he took. Litigation in this country has evolved tremendously for the better over the last decade, such that trials cannot be conducted in tranches or in instalments.

[30] As hindsight shows in this case, the issue is not as complicated as learned counsel makes it out to be. It is only a matter of determining the legality of the action of withdrawal by Public Prosecutor of the transfer certificate and the manner in which the learned judge exercised his discretion under s. 417(2) of the CPC.

[31] In any event, the appellant has since been able to put forth his case on this issue in its fullest before the Court of Appeal and this court. Whatever time they did not have in the High Court have been fully compensated by the time passage from the High Court hearing. In the circumstances, we see no breach of natural justice on the part of the learned judge.

Existence Of A Second Judgment

[32] Learned counsel also complained that the learned judge had given two judgments, one on 7 February 2019 and the other 15 February 2019. The complaint here is that some reasons and case law set out in the second judgment were not mentioned in the first judgment and this had led to a situation where learned counsel was deprived of the opportunity to submit on those missing reasons and case law.

[33] It is also submitted that the learned judge in his first judgment did not intimate that it is only "brief grounds" or that "full grounds will follow".

[34] To put the matter into its proper perspective, the issue before the learned judge was purely an issue of law. He was not required to adjudicate on any dispute of facts. The only issue before the learned judge was the legality of the withdrawal of transfer certificate and the consequence of that withdrawal. The deliberation of the issue did not require the learned judge to seek out facts to justify his decision and this was not done by him. This is reflected clearly in the second judgment. What the learned judge did is practiced prevalently among judges in the country when they are dealing with interlocutory matters especially in the criminal courts which required a quick decision.

[35] The Public Prosecutor was correct to say that what the learned judge did is nothing out of ordinary and is done by judges in the exercise of their duties. This can be seen in the case referred to us by the Public Prosecutor - *Re Application of Tan Boon Liat; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126; [1976] 2 MLJ 83, where Abdoolcader J had this to say:

> I must express my appreciation to counsel on both sides for the careful arguments addressed to me and it is no indication of disrespect of them that I have not in this Judgment dealt with cases they cited and discuss other authorities not cited by either side but which appear to me to be pertinent to the crux of the contention raised in this matter ...

[36] Accordingly, we see no merit in the complaint of the existence of a second judgment.

Public Prosecutor's Withdrawal Of The Transfer Certificate Was Wrong In Law

[37] Learned counsel submits that the decision of the Public Prosecutor in having issued and utilised the transfer certificate, he is *functus officio* and prohibited from withdrawing the transfer certificate.

[38] Learned counsel spent some 30 pages of his written submission on this issue and in substance says that the concept of *functus officio* is not confined only to decisions of a court. The Australian case of *Leung and Another v. Minister for Immigration and Multicultural Affairs* [1997] 150 ALR 76 is relied on. There, the Federal Court said this:

> A similar rule applies to the exercise of a statutory power or function but for a different reason. If a statute confers or a function, once that power has been exercised or the function performed the purpose for its creation has been fulfilled with the consequence that the power or function is exhausted. In *Blacks Law Dictionary* (5th Enclosure 2a dismissed, 1979) "*functus officio*" is defined as "a task performed" and it is applied to an "instrument, power agency etc which has fulfilled the purpose of its creation and is therefore of no further effect or virtue.

[39] With respect to learned counsel, in looking for an answer to the issue at hand, we must look at the provisions which empowers the Public Prosecutor in regard to such certificate. Those provisions are s. 418A(1) of the CPC and s. 60 of the MACC Act. The provisions are very explicit, in that, Parliament has conferred on the Public Prosecutor the power to issue a certificate requiring a subordinate court to transfer to the High Court any particular criminal case which is triable by the subordinate court and which is pending before that court.

[40] Admittedly, the two sections do not specify the power of withdrawal by the Public Prosecutor. However, such power can be read into the sections by virtue of art. 145(3) of the Federal Constitution. The certificate of transfer falls within the ambit of the power of the Public Prosecutor to institute the proceedings for an offence before a court of criminal jurisdiction.

[41] Hence, we say that the learned judge was not wrong in saying that with the power to institute, comes the power to withdraw the certificate. Section 40(1) of the Interpretation Acts 1948 and 1967 provides:

> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable to do or enforce the doing of the act or thing.

[42] The learned judge had rightly pointed out that s. 418A of the CPC and s. 60 of the MACC Act are supported by not only cl. (3) of art. 145 of the Federal Constitution but also cl. (3A). By implied reading of the sections, a decision to withdraw the certificate, similar to the power to transfer by issuing the certificates, is a subset of the power to institute a case.

[43] However, the purport of withdrawal of the certificates in this case was more on the Public Prosecutor taking proactive steps in preserving the *status quo* of the proceedings, precluding any future constitutional challenge of the provisions that form the basis of the proceeding itself in light of the recent Federal Court decisions in *Semenyih Jaya* and *Indira Ghandi*.

[44] The consequences to this is that the power of the Public Prosecutor is finally spent (*functus officio*), contrary to argument of the learned counsel for the appellant, when the certificates were withdrawn and that the proceeding of the seven charges will notionally go back to the Sessions Court, the place of their origin.

[45] For reasons stated above, we agree with the learned judges of both courts that there is no prohibition on the Public Prosecutor to withdraw as the concept of *functus officio* has no application at all.

3. The manner in which the learned Judge exercised his discretion under section 417 (2) of the CPC was flawed both in law and fact.

- "his own initiative"

[46] The first issue which needs to be dealt with is the complaint that the learned judge did not act on his own initiative but rather at the behest of the Public Prosecutor which would run foul of s. 417(2) which requires the court to act on its initiative.

[47] With respect, we also find no merit on the complaint. The circumstances in which the learned judge was confronting then must be taken into account. The learned judge was faced with a situation where the Public Prosecutor wanted to withdraw the transfer certificate and due to the credit of the Public Prosecutor, he had set out the two options available to the learned judge who then invited submissions from respective counsel when the withdrawal of the transfer certificate met with opposition from the counsel for the appellant. Under such circumstances and with respect, it cannot be said that the learned judge was nudged by Public Prosecutor to exercise his discretion.

Correctness Of The Learned Judge's Exercise Of Discretion Under S. 417(2) CPC.

[48] As to whether the learned judge was correct to exercise the discretion, the answer can only be found in the manner the learned judge exercised that discretion. To put it in another way, did the learned judge take into consideration of relevant matters. It is only when the learned judge had weighed in all the relevant consideration prior to exercise his discretion can it be said that he had act judicially.

[49] Section 417(2) requires the learned judge to direct his mind to matters as stipulated under s. 417(1)(a) to (e) when exercising his discretion. The provision that is relevant to the present transfer is s. 417(1)(e) which reads:

417. High Court's power to transfer cases.

(1) Whenever it is made to appear to the High Court:

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

The crucial phrase here is "expedient for the ends of justice"

[50] The learned High Court Judge transferred the cases to the same High Court instead of going to the new case registration route as it appeared to him that such an order is expedient in the ends of justice premised on the following considerations:

(i) There were three contested applications on the seven charges one of which is the basis of the present appeal. There have been case management sessions, various issues had been raised and considered and trial dates have been fixed to begin on 12 February 2019,

(ii) The accused applied for a transfer to the High Court under the same provision in other charges,

(iii) This case has generated so much public interest locally as well as internationally,

(iv) The issuance of the certificates under s. 418A of the CPC and s. 60 of the MACC Act were never objected by the accused when he was first charged,

(v) There is no prejudice or injustice caused to the accused as there has been no changes to the proceeding at all other than the transfer,

(vi) Parties should have been ready for the trial which ought to have begun in less than one week after the proceeding in the High Court. The prosecution has also complied with s. 51A in the delivery of documents that they intend to tender. Trial date was fixed seven months ago.

[51] It should be noted that the threshold is very low by virtue of the language used in s. 417(1) - "when it appears to the High Court" instead of "if the court is satisfied" which require further consideration of the matter.

[52] The basis of the transfer has justified the exercise of such power vested in a High Court Judge. Although the section uses the term 'High Court' instead of 'a judge', judge should be read into 'High Court' as the section provides for powers vested in the High Court, a court which is presided by a judge appointed with specific powers and jurisdictions. Therefore, any contention that there has been a usurpation of the powers of the Chief Judge of Malaya is misconceived.

[53] As regard to the type of order the learned judge could make, he is bound by s. 417(aa) to (cc) which provides as follows:

(i) that any offence be tried by any court not empowered under s. 121 to 126 but in other respects competent to try such offence;

A (ii) that any particular case or class of cases be transferred from a criminal court subordinate to it to any other such criminal Court of equal or superior jurisdiction; or

(iii) that any particular criminal case be transferred to and tried before the High Court.

B **[54]** The learned judge made an order for the seven charges to be transferred and tried before the High Court. This is in line with s. 417(1)(cc). The complaint here is more on whether it is legitimate for the learned judge to order the transfer of the seven charges back to the same High Court without going through the registration system. The learned judge had C correctly decided that he could do so, bearing in mind that the court would exercise this power on its own motion (*suo moto*) only exceptionally. The learned High Court Judge found that the considerations that he cited earlier compelled the *suo moto* act.

D [58] However - and this is the crucial point - such a process would be applicable for transfer applications made by the prosecution or the accused under Section 417(2). It is automatically applicable to situations like presently where the transfer is moved by the initiative of the High Court itself under the same Section 417(2). When the High Court decides to exercise its discretion to invoke Section 417(2) it is unnecessary that the formalities of going through the registration routing system be followed, E provided that the requirements of Section 417 is adhered to, particularly the ground for the transfer as stated under Section 417(1)(a) to (e), bearing in mind that the Court would exercise this power on its own motion only exceptionally.

[55] The learned High Court Judge further stated that it is expedient in the F end of justice to transfer the seven charges on the court's own initiative as the charges might be registered in a different High Court had they gone through the registration route which means a new trial date would have to be fixed depending on the court's available dates whereas the dates have been fixed in the present High Court several months back in August 2018. This G would further delay the proceedings which would be against public interest due to the seriousness of the cases.

[56] We see no error on the part of the learned judge in exercising his discretion in the manner that he did. He did not take into irrelevant considerations. Appellate courts generally do not disturb the manner in H which a judge exercises his discretion unless there is a blatant error. Here, there was no such blatant error. In fact, the contrary is true. The discretion had been exercised judicially. It is in the public interest as well as the interest of the accused that criminal cases are to be disposed of expeditiously by the courts.

I

[57] We are also in agreement with the learned judge's view that the withdrawal of the transfer certificate is effective only prospectively and has no effect on the proceedings on the seven charges since 4 July 2018 before the withdrawal which remain valid. The learned judge in our view puts it most appropriately when he said:

> Plain common sense and logic which would readily accord with the ends of justice would also dictate that there is no rhyme or reason to unnecessary hold the proceedings at the High Court preceding the withdrawal to be a potential nullity.

[58] Finally, even if there is any irregularity in the exercise of the power (which we say there is none), this is well within the ambit of the general curing provision under s. 422 of the Criminal Procedure Code which provides as follows:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[59] It is not insignificant that s. 422 does not even vitiate proceeding for the lack of sanction which should be of a higher threshold and of greater impact than a transfer procedure.

[60] Based on the foregoing, we agree with the High Court as well as the Court of Appeal that the learned High Court Judge did not err in law in exercising his power under s. 417(2). Thus, the transfer was valid and not flawed neither in law nor in fact. The discretion has been judicially exercised hence there is no question of legality as contended by the appellant.

[61] For reasons stated above, we dismiss the appeal.

[62] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964 in view of the absence of our learned sisters, Justice Tengku Maimun binti Tuan Mat and Justice Nallini Pathmanathan.